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Nos. 471 and 472

DEC 31

# In the Supreme Court of the United States

OCTOBER TERM, 1934

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UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION, ET AL.,

*Petitioners,*

*v.*

BANKERS TRUST COMPANY AND WILLIAM H. BIXBY, TRUSTEES,

*Respondents.*

---

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## RESPONDENTS' REPLY TO THE JOINT BRIEF OF THE UNITED STATES AND THE RECONSTRUCTION FINANCE CORPORATION

---

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29 December, 1934.

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## RESPONDENTS' REPLY TO THE JOINT BRIEF OF THE UNITED STATES AND THE RECONSTRUCTION FINANCE CORPORATION

In replying to the Brief of the Government and the Reconstruction Finance Corporation it is proper first to remove any doubt as to the issues presented in this case. Much of the discussion in the Brief seems to us irrelevant, because it is based on erroneous conceptions of the contentions of the Respondents or because it ignores the nature of the relief sought and obtained by the Petitioners below.

1. THE MEANING OF THE GOLD CLAUSE. For obvious reasons the Petitioners seek to construe the gold clause as if it provided merely for a means of payment and not a standard or measure of value. If their contention be sound, that the parties were interested merely in providing for the payment of "coin," as if the bondholders had been coin collectors, the Joint Resolution was unnecessary and the decree below

was academic. The Congress has undoubted power to say what shall circulate as coin in the United States. On January 30, 1934, all gold coin was withdrawn from circulation by the Gold Reserve Act. If the obligation of the bonds was merely to pay coin, why was it necessary to get a decree below sustaining the Joint Resolution?

The parties must be deemed to have contracted with full knowledge of the power of Congress to withdraw from circulation gold coin of the standard of weight and fineness existing on May 1, 1903. The problem, if there be any problem, is to determine what the parties intended should be their mutual rights if gold coin of the specified weight and fineness were withdrawn from circulation. If the Court finds that it was merely intended that, in that event, the Mortgage debt could be satisfied by the payment of the nominal amount in any current dollars, the Court will have no need to consider the Joint Resolution in this or any other case. The Joint Resolution will have been unnecessary. The only question in any case will be whether at the time of judgment the specified gold coin is in circulation.

But if, as we think is quite evident, the parties were not interested in coins, but in gold value, they clearly intended that, if the standard gold coin referred to in the contract should be withdrawn from circulation, the equivalent gold value should be paid. The effect of the Joint Resolution was in substance to provide that, if the standard gold coin should be withdrawn from circulation, the equivalent gold value need not be paid, and that any kind of new dollars would satisfy the mortgage debt if tendered in an amount equal to the numerical amount of the standard gold dollars specified in the bonds. It is only because the Joint Resolution had this effect, and because the Court below held that the Joint Resolution was constitutional, that it is necessary to have any argument before this Court.

This preliminary restatement of the Respondents' position is required because a very large part of what is said in the Brief of the Petitioners is relevant only if the gold clause be construed as providing merely for the payment of coin and not as providing for the repayment of gold value.

2. The Relief Obtained by the Petitioners Below. Much of the discussion in the Petitioners' Brief, and all of the extended analysis of the various Proclamations and Orders issued between March 4, 1933 and the enactment of the Gold Reserve Act on January 30, 1934, have no real bearing on the issues presented here for a further reason,—

Throughout the Petitioners' Brief the case is discussed as if a bondholder had brought a suit at law on a bond which had matured on May 1, 1933. That is not this case at all. The Respondents are Trustees of a mortgage on certain property, title to which is now vested in the Trustees of the Debtor. The Respondents' intervening petition does not even allege that the Debtor ever assumed the mortgage or agreed to pay the bonds (R. 52-59). The decree was not entered on any motion of the Respondents for a determination of the amount of their lien. It was entered on a motion of the Petitioners for a decree to the effect that the Respondents' lien could be discharged upon payment of the numerical amount specified in the bonds in any legal tender money (R. 76, 80-81, 96, 102, 109, 131). The prayer in the Respondents' intervening petition with respect to the ultimate determination of their lien was qualified (R. 58), and no motion had been made by the Respondents for any such determination. No order had been entered which required the filing of the claims of the bondholders (R. 11-15). No plan was before the Court. No tender of the amount of the mortgage debt had been made.

The effect of the decree therefore was simply to dispose of the issue of law as to the validity of the gold clause and

the constitutionality of the Joint Resolution as applied to the mortgage of which the Respondents are Trustees (R. 131-134). Unless the decree be reversed, the mortgage can be satisfied by the payment of 34,548,000 of any kind of dollars which may be current at any time, whether they have the gold value contracted for by the parties when the mortgage was executed, or only an infinitesimal fraction thereof.

It necessarily follows that the fact that the mortgage matured on May 1, 1933, is of no significance whatever. After its maturity the mortgage remained a valid and subsisting lien according to its terms. On June 5, 1933, the Congress undertook to change those terms. The only question is whether Congress had the power to do this. If it had, the change was effected and is permanent. Otherwise, the terms of the mortgage are just what the parties intended they should be.

In replying to the Brief of the Government and the Reconstruction Finance Corporation we shall try to follow as nearly as practicable the order of the Brief:

"QUESTION PRESENTED" (pp. 2-3)

This case does not involve "any contractual provision which either rejects * * * legal tender or accepts it at a measured discount" (p. 3). There is no question here of a refusal to accept legal tender at its face value. The question is whether the mortgage obligation to pay gold value has been validly impaired by the Joint Resolution. The Respondents will accept legal tender if the real amount of the mortgage debt be tendered.

"STATEMENT" (pp. 3-6)

In view of what has been said above, and of the statement contained in the beginning of this Brief, comment on the statement contained in the Petitioners' Brief seems unnecessary, except to point out that the Assignments of Errors which set forth the true equivalent in current dollars of "gold

coin of the United States of the standard of weight and fineness on May 1, 1903," speak as of the time of the decree and of the Assignments (R. 136, 252-253). The Respondents' position is that the principal amount due on the mortgage is the same as it always was, measured by gold value, and that, if there be further changes in the current dollars, the equivalent in current dollars will necessarily change accordingly, unless and until the Respondents pray for a decree fixing the amount in current dollars.

"SUMMARY OF ARGUMENT" (pp. 6-10)

As the summary merely outlines the argument which follows, we shall limit ourselves to discussing the argument itself.

"I"

**"Public Resolution No. 10, approved June 5, 1933 is constitutional and controlling in the case at bar"** (pp. 10-96)

"1. Introductory" (pp. 10-13)

We agree that a law enacted by Congress is presumed to be constitutional unless the contrary appears with reasonable clarity. We do not, however, agree that there must be "a factual foundation of record for overthrowing it," or that "the burden is upon those attacking the law to demonstrate its unconstitutionality by clear and convincing proof" (Petitioners' Brief, p. 11). The petitioners cite no authority for this proposition. *Lynch* v. *U. S.*, 292 U. S. 571, is a recent instance in which the Court has found that there was no relation between an Act of Congress and the power purported to be exercised. In the *Lynch* case the Court did not require factual evidence that the repudiation of a contract did not tend to establish the credit of the United States. We do not think that in this case there was any burden on the Respondents to offer testimony.

At page 12 it is asserted that the judgment of Congress in choosing means to execute its powers "will not be overturned unless clearly arbitrary or capricious." The cases cited hardly support this proposition. We think the true test is that the means must be "reasonably adapted" to a legitimate end within the scope of a Congressional power (*Ling Su Fan* v. *U. S.*, 218 U. S. 302, 311). The Fifth Amendment imposes the *further* requirement that the means be not "unreasonable, arbitrary or capricious" (*Nebbia* v. *New York*, 291 U. S. 502, 525).

*"The Gold Clause"* (pp. 13-18)

The construction of the gold clause, briefly mentioned under this heading, is discussed in our Main Brief at pages 19-33 and below at pages 33-34.

We think that the words "gold coin clause" and "gold value clause" usually designate *different interpretations* of the same clause rather than clauses differently worded. The Petitioners say in their Brief that the gold clause involved here is "typical" (p. 17) and "the most common type" (pp. 13-14). It is substantially identical with that contained in the Government bonds. Congress was obviously legislating about the typical clause, which it evidently understood to be a gold value clause (see Senator Fletcher's statement, quoted at pp. 60-61 of the Petitioners' Brief). Indeed, unless the typical gold clause was a gold value clause, there was no reason for Congress to enact the Joint Resolution. If there be any gold clauses in existence which in so many words call for "gold coin or an amount of money measured thereby" (Petitioners' Brief, p. 14), they are very rare indeed; the Petitioners do not suggest that of all the vast sums mentioned in their Brief as much as $1,000 is due on any such clause. Unless the typical clause be a gold value clause, Congress could have simply withdrawn the standard gold coin from circulation, as it did later under the Gold

Reserve Act, and, whatever the moral aspects of such a withdrawal, there would have been no constitutional question presented.

"2. There was a reasonable basis for Congressional determination that the gold clause is contrary to public policy, inconsistent with our present monetary system and an obstruction to the exercise by Congress of its monetary and other powers" (pp. 18-68)

As the preliminary statement under the above heading at pages 18-19 is in general language, we will reply only to the contentions advanced in detail at pages 19-68.

"A. *Justification of the gold clause was removed when the dual monetary system was ended by the parity provisions*" (pp. 19-24)

"(I) THE DUAL MONETARY SYSTEM" (pp. 19-20)

The Petitioners contend that at one time there was something which they call "the dual monetary system," and that while there was such a system it was appropriate to use the gold clause. And, they say, "with the adoption of the principle that all coins and currencies of the United States should be equal, the gold clause lost the significance and the justification which it earlier possessed" (p. 26). To these propositions they devote from pages 19 to 26 of their Brief.

The theory that a gold clause is inappropriate at a time when all forms of dollars are maintained on a parity is based on a misconception of the purpose of the clause. Since its purpose is to determine the rights of the parties in the event that there should be a new standard before payment, or if all forms of circulating money should not be maintained on a parity at the time of payment, the fact that at the time of the issuance of a gold clause obligation all forms of money are maintained on a parity with the existing standard is immaterial. The purpose of the clause is to guard against the risks of the future.

The history of the use of the gold clause completely disposes of the Petitioners' contentions. They correctly cite the Gold Standard Act of 1900 as establishing a standard gold dollar and expressly directing that all forms of money be maintained on a parity with the standard (p. 25). If there ever had been a "dual monetary system," Petitioners agree that it was no longer in operation after 1900 (p. 25). Yet, the same Gold Standard Act provided for the issuance of gold clause obligations by the Goverment (C. 41, § 2, 31 Stat. 45, Title 31, U. S. Code Ann Sec. 408). And on February 4, 1910 Congress enacted a law requiring that *all* Government bonds contain such a clause (C. 25, 36 Stat. 192; Title 31 U. S. Code Ann., Sec. 768). The Congress of 1933 may have regretted that the previous Congresses took these steps to assure investors in Government bonds that they would be repaid money of the same standard that they lent the Government, but the devaluation of the dollar authorized by the Congress of 1933 *proved* "the significance and the justification" (p. 26) of the use of the gold clause.

While it thus appears that the contentions advanced at pages 19-26 are demonstrably unsound, some of the incidental statements require brief comment.

It is not the historical fact that prior to 1862 the circulation of state bank notes made the use of the gold clause particularly appropriate. The state bank notes were not legal tender, and the states had been expressly forbidden by the Constitution from making them such (Article 1, Section 10, Clause 1). Prior to 1862 the only legal tender consisted of coins struck by the United States, and creditors did not need to protect themselves from being forced to accept state bank notes.

Gold clauses had an earlier origin. Indeed, as already shown in our main Brief at pages 21-22, a clause remarkably like the one involved in this case was in common use even before the Constitution was adopted. In Hamilton's

Plan for the Constitution submitted to the Convention in 1787 he suggested that one of the qualifications for Presidential electors be "a clear personal estate of the value of one thousand Spanish milled dollars of the present Standard" (Farrand, The Records of the Federal Convention, Vol. III, p. 622).

"(II) BRONSON *v.* RODES" (pp. 21-24)

There is no doubt that at the time *Bronson* v. *Rodes,* 7 Wall. 229, was decided there were two kinds of lawful money circulating, and that the Greenbacks fluctuated in terms of the coin. But the mortgage involved in the case was executed in 1851, long before the Greenbacks were issued. The only significance of the fact that gold coin was lawful money when the judgment was entered is that the Court was able to enter judgment payable in gold coin. It is true that the situation today is not precisely analogous, in that gold coin no longer circulates, and a judgment cannot be entered today in gold coin. But bondholders and mortgagees can be accorded the relief granted in *Gregory* v. *Morris,* 96 U. S. 619.

The current dollar is by statute, if maintained at a parity, equivalent to a gold coin of a lesser gold content than the old gold dollar. It is virtually conceded at page 115 of the Petitioners' Brief that if the new gold dollar were coined, 1,000 new gold dollars would not discharge a bond which called for 1,000 of the old gold dollars (see *infra,* p. 33). How can it possibly be said that the debt can be discharged with 1,000 new dollars *in paper,* if it concededly could not be discharged with 1,000 new gold dollars *in coin?*

"(III) THE PARITY PROVISIONS" (pp. 24-28)

All the discussion under this subheading uses the word "parity" in an erroneous sense. Parity of money means simply that all forms of money *circulating at the same time*

are maintained at a parity according to their respective denominations. It does not mean that a circulating money is to be maintained on a parity with money that has ceased to exist and a standard which has been abandoned.

Parity with the legal standard, that prescribed by the Gold Standard Act, was not in fact maintained after April 19, 1933, when it was announced that exports of gold would not be permitted (see Petitioners' Brief, p. 106, and Appendix to Petitioners' Brief, pp. 18-21) and *was not* being maintained when the Joint Resolution was passed (id.). That announcement was taken to mean that the dollar would probably be cut, and as a result the circulating money, exclusive of gold coin and gold certificates (the legal status of which was and still is in doubt), ceased to have the value of the standard gold dollar established by the Gold Standard Act, as was clearly shown by the quotations of gold standard foreign currencies (see Commercial & Financial Chronicle, April 22, 1933, vol. 136, pp. 2653-2656, 2751). The disparity between the dollars generally used and the standard gold dollar was subsequently increased through the purchase of gold by the Treasury and the Reconstruction Finance Corporation at increasing prices, measured in terms of the other dollars (see below, pp. 31-32).

The Agricultural Adjustment Act did have the effect of making all forms of currency legal tender (Act of May 12, 1933, C. 25, Sec. 43, 48 Stat. 52). But it no more established parity between other dollars and the standard gold dollar, which was then still established by statute, than did the Legal Tender Act of 1862 establish parity between Greenbacks and the gold coin of that time. On the contrary, the disparity in market value between the money generally circulating and the standard gold dollar continually increased, and was reflected in the steadily decreasing value of the circulating dollars in terms of all foreign gold standard currencies and the continuously increasing price paid by the Treasury and the Reconstruction Finance Corporation

for gold. Much, if not all, of the disparity was, of course, forced (see below, pp. 31-32).

On page 26 of the Petitioners' Brief it is also stated that

> "With the adoption of the principle that all coins and currencies of the United States should be equal, the gold clause lost the significance and the justification which it had earlier possessed."

So long as the standard established by the Gold Standard Act was continued, all forms of money were supposed to be maintained on a parity with the dollar of *that* standard. The Thomas Amendment of the Agricultural Adjustment Act (Act of May 12, 1933, C. 25, Sec. 43, 48 Stat. 52) authorized the President to establish a *new* dollar of a *new* variable standard and directed that, when the President did so, the Secretary of the Treasury should maintain all money on a parity with the *new* variable standard. But the *new* dollar, if established, was to take the place of the old standard, and Congress could not expect to achieve the impossible feat of maintaining all forms of money on a parity with two unequal standards at the same time.

Parity with the *old* standard was maintained until April 20, 1933 (see below, pp. 31-33). Parity with the *new* standard has been maintained since the new dollar was established by the President at 3:10 P. M. on January 31, 1934 (Appendix to Petitioners' Brief, pp. 144-148). It is a variable standard because the President has expressly reserved the power to change it (p. 148).

The Petitioners' statement, therefore, seems to be erroneous in three respects:

First, the principle that "all coins and currencies of the United States should be equal" had not been "adopted" by the Agricultural Adjustment Act; it had been adopted not later than 1900 in the Gold Standard Act, and had been abandoned on April 20, 1934, when the export of gold was

prohibited and that fact coupled with the fear of a reduction in the gold content of the dollar, brought about a disparity between the standard gold dollar and the money generally circulating;

Second, the actual disparity which existed after April 20, 1934, first gave a practical effect to the gold clause; the possibility that such a disparity might develop was one of the contingencies which gave the clause a practical importance;

Third, the Agricultural Adjustment Act also authorized the President to reduce the gold content of the dollar (Act of May 12, 1933, C. 25, Sec. 43, 48 Stat. 52-53), or, in other words, to establish a new dollar and to abandon the standard established by the Gold Standard Act; the gold clause was intended to provide against the action which was forecast by the Act.

Thus in all the discussion of parity in the Petitioner's Brief we find the identical fallacies which are contained in the recitals of the Joint Resolution (see our Main Brief, pp. 52-53). Congress said that the gold clause contracts were inconsistent with the policy of maintaining parity. But the demonstrable fact is that *Congress was not maintaining parity with the standard established by law when the Joint Resolution was enacted, and, if Congress had intended to maintain parity with that standard, the gold clause would have had no practical effect.* It was only because it was not maintaining parity with the established standard, and had authorized a new standard, that it had any occasion to take notice of the existence of the gold clause contracts.

In the light of these facts the Treasury Memorandum quoted at pages 26-28 is interesting. So far as it concerns us here there is only one important statement:

> "One of the purposes of the resolution is to remove any doubt and to avoid confusion, so that debtors and creditors may have a clear definition of their legal position."

In other words, the purpose of the Joint Resolution was to "determine" the rights of debtors and creditors in the sense of having Congress fix these rights. The function of determining the existing rights of creditors was for the courts. Congress had no function in the matter, unless Congress had the power to change their rights. Whether Congress had such power is, of course, the question in the case.

"B. *The gold clause is an obstruction to the exercise of the powers of Congress, as shown by its bearing upon recent legislation designed to cope with the monetary and financial crisis*" (pp. 28-98)

"(I) THE MONETARY AND FINANCIAL CRISIS" (pp. 28-41)

At pages 28-41 there is a resume purporting to set forth "The Monetary and Financial Crisis." It would serve no useful purpose to undertake here an extended discussion of the economic aspects of the situation on June 5, 1933. But, lest it be thought that we accept the Government's interpretation of the situation which existed in 1933, in so far as it relates to the question presented here, it is proper to say that well known economists do not appear to draw the inferences which the Petitioners wish the Court to draw. We suggest that

First, the question whether a gold bullion standard or a gold coin standard is desirable is irrelevant in a discussion of a gold *value* obligation;

Second, while the "collapse of the price level" was very severe, it does not appear that it brought prices below the level of 1903, when these bonds were issued; there is no reason why the 1926 "price level" should be taken as normal; nor does it appear that the decline was so much more severe than the declines which took place in the secondary depressions after the War of 1812 and the Civil War as to make it desirable to use remedies radically different from those which served then to restore normal conditions and the worth of which was established by experience;

Third, while the debt burden was doubtless heavy, there had been much liquidation by normal and constitutional processes prior to June 5, 1933, and it does not appear that such an arbitrary short-cut impairment of contracts would have been desirable from any point of view even if the Federal Government had been a government of unlimited powers;

Fourth, the crisis of February and March, 1933, was preeminently a banking crisis, not a monetary or fiscal crisis involving the Government, as the relative amounts of currency and gold withdrawn show; the gold reserves were enormous, for even after the withdrawals of gold about which the Petitioners write so much, the Federal Reserve Banks had $2,952,000,000 in monetary gold stocks at the end of February, 1933, which was more than they had in August, 1929, at the high point of the boom (Federal Reserve Bulletin, April, 1933, p. 260; figures for March 4th are not given), and on March 4th, according to the Petitioners' figures, the gold stocks in the Federal Reserve Banks, and the Treasury totalled $3,616,000,000 (Petitioners' Brief, p. 53); the trade position of the country was impregnable, as contrasted with that of England in 1931.

The disproportion between gold stocks and gold clause obligations (referred to in the Petitioners' Brief, pp. 41, 53) is no more significant than the present disproportion between currency outstanding and all debts. As one writer has said, even if coin were required to meet them it would be no more necessary to have gold to meet all gold clause obligations at one time than it is to build an exit from an office building so large that all the people in the building can go out at exactly the same second.

The Government's argument comes to this:

If the Administration agrees on certain economic theories and on the remedies to be used in treating our financial ills and presents them to the Congress and the Congress approves them, constitutional limitations on the powers of the Congress no longer exist.

In other words, if the Congress determines on a course of action which it conceives might be beneficial generally or to a certain group (in this case the debtors) except for the existence of previously incurred obligations, all that Congress need do is to declare that such obligations constitute an embarrassment—obstruct its power—and they may be removed.

"(II) LEGISLATION DESIGNED TO COPE WITH THE MONETARY AND FINANCIAL CRISIS" (pp. 41-44)

Under this heading, in four pages, the Petitioners give a brief and significantly incomplete summary of the legislation enacted by Congress to meet the "monetary and Financial Crisis." The most significant steps taken are not mentioned in the Petitioners' Brief. They consisted of the intentional depreciation of the dollar through the purchase of gold at more than market prices by the Treasury and the Reconstruction Finance Corporation (see below, pp. 31-32).

But this omission from the Petitioners' statement is not the most significant thing about their summary of what was done. *The outstanding fact is that the Petitioners make no effort whatever to show that the fiscal legislation was in any way adapted to meet the crisis.* Of course, it is clear that if there be a temporary run on gold, payments of gold may have to be stopped. But why dollar devaluation and the other fiscal legislation of "a permanent nature" (p. 41) was necessary or desirable does not appear.

Not an authority is quoted to show that deliberate dollar devaluation was desirable in the United States because other countries, less strong financially, had been forced to devalue their currencies. It does not appear that any convincing testimony was ever given before Congress on the subject or that Congress made any findings. As to the advisability of adopting a gold bullion standard, which has nothing to do with the case, the Petitioners later cite a mass of authorities (p. 55). To explain devaluation they cite none.

Furthermore, the devaluation was completed almost a year ago, but the only result attributed by the Petitioners in their Brief to the fiscal policy is a treaty with Cuba (p. 44). And, after advancing the "collapse of the price level" and the need for re-establishing it at the 1926 level as a reason for dollar devaluation (1926 being the year the Department of Labor happened to use as an index in computing variations), Petitioners say elsewhere in their Brief that the price level was not affected by the devaluation. For they contend that if the bondholders had been paid on May 1, 1933, they could have bought "no more food, no more raiment, no more property" than they can buy now with the same number of devalued dollars (pp. 135-136). Thus they base one of their principal arguments on the ground that the devaluation did not affect the price level.

In the absence of other evidence of the relation between the monetary policy and the crisis, we may look to an enactment of Congress and a statement of one of its authors.

What is the significance of the legislation? The Agricultural Adjustment Act of May 12, 1933, stated that its purpose was to raise prices of farm commodities (Act of May 12, 1933, Secs. 1, 2; C. 25, 48 Stat. 31-32). The author of the Thomas Amendment, Section 43, stated the purpose of that amendment to be (Congressional Record, p. 2229, italics ours):

> "Mr. President, the amendment, in my judgment is the most important proposition that has ever come before the American Congress. It is the most important proposition that has ever come before any parliamentary body of any nation of the world. Saving the single issue of the World War, there has been no issue joined in 6,000 years of recorded history as important as this issue pending here today.
>
> "Mr. President, it will be my task to show that if the amendment shall prevail it has potentialities as follows: It may transfer from one class to another class in these United States value to the extent of almost $200,000,000,000. This value will be transferred, first, from those who own the bank deposits.

Secondly, this value will be transferred from those who own bonds and fixed investments.

"I want to make that statement clear. No issue in 6,000 years save the World War begins to compare with the possibilities embraced in the power conferred by this amendment. *Two hundred billion dollars now of wealth and buying power rests in the hands of those who own the bank deposits and fixed investments, bonds, and mortgages. That $200,000,000,000 these owners did not earn, they did not buy it, but they have it,* and because they have it the masses of the people of this Republic are on the verge of starvation —17,000,000 on charity, in the bread lines.

*"If the the amendment carries and the powers are exercised in a reasonable degree, it must transfer that $200,000,000,000 in the hands of persons who now have it, who did not buy it, who did not earn it, who do not deserve it, who must not retain it, back to the other side—the debtor class of the Republic, the people who owe the mass debts of the Nation."*

"(III) EFFECT UNDER RECENT LEGISLATION IF GOLD CLAUSE ENFORCEABLE" (pp. 44-45)

The existence of the gold clause contracts may have been one of the many factors Congress should have considered before it embarked upon its novel monetary program. But the abandonment of a fixed standard of value and the substitution of a variable unit of currency or irredeemable paper money is itself a step of supreme importance and is sure to have far-reaching effects. The effects to be anticipated are a proper subject for Congressional consideration.

But it does not follow that Congress can lay the stage for dollar manipulation by attempting to counteract the anticipated effects in advance by means of the "regulation" of public and private contracts, private property, and private relationships. All prices and all wages are affected in greater or lesser degrees by a dollar devaluation, and if the effects can be regulated Congress has simply unlimited power.

And, unless the purpose of the devaluation was to impair the real value of the gold clause contracts, there was no reason for the Joint Resolution. Gold clause contracts would be affected only *nominally,* not really.

As the Permanent Court said in *Case of Brazilian Loans,* at page 117 (see our Main Brief, pp. 24-29, 50):

> "In this connection, it should be observed that in the present case there was no reason for the borrowers not to offer payment in gold; for such payment, while constituting a security for the lender, involved no risk for the borrower. The devalorization of the French franc could not in fact increase the obligations of the latter; the gold clause merely prevents the borrower from availing itself of a possibility of a discharge of the debt in depreciated currency."

This subject is referred to again below (p. 19 and pages there cited).

"(I) THE GOLD CLAUSE—INCOMPATABILITY WITH THE PARITY AND LEGAL-TENDER PROVISION" (pp. 45-48)

The argument under this heading is unsound, as already pointed out above at pages 9-12 (see also our Main Brief, pp. 52-53).

The statement of Justice BRADLEY quoted at pages 45-46 was the expression of a single Justice, in whose opinion no other Justice concurred. All he said was that the Court was not deciding a point which was not before it. So far as his additional observation is concerned, it is sufficient to say that he was one of the dissenting Justices in *Trebilcock* v. *Wilson,* 12 Wall. 687.

It is not true, in any real sense that, as stated at page 46:

> "Every tendency toward fluctuation in the relative value of coin and currency is intensified by the special demand for gold coin, created by the existence of gold-clause obligations."

If the current money is maintained at a parity with gold, and people are satisfied that it will continue to be, no one needs gold, whether he owes gold coin obligations or not, for checks and paper money will be accepted at a parity and are far more easy to handle. If, however, people think that paper money will depreciate in terms of gold, they want gold, whether they owe gold clause obligations or not. If people think that paper money will appreciate in terms of gold, as it did for the most part from 1865 to 1879, they want paper money, whether they owe gold clause obligations or not. Since gold clause obligations are gold value obligations, and are practically never met by actual delivery of coin, they occasion no special demand for gold coin.

It does not appear that the Government was unable to meet all its gold value obligations in due course. Perhaps a temporary suspension of gold payments was desirable, despite the enormous gold reserves, but that is an entirely different thing. Payments of specie were suspended many times in our history prior to 1933, but never did the Government fail to meet its obligations after any previous suspension.

"(II) THE GOLD CLAUSE—AN OBSTRUCTION TO THE POWERS OF CONGRESS TO REGULATE THE VALUE OF MONEY" (pp. 48-53)

The argument under this heading seems to be principally a restatement of arguments which we have already answered (see our Main Brief, pp. 49-52; also *ante,* pp. 17-18, and *infra,* pp. 25, 27, 40-42).

It seems unnecessary to point out again that the increase in obligations through dollar devaluation is *nominal,* not real. Throughout the Petitioners' Brief the word "dollar" and the dollar sign are used indiscriminately to designate the *old* and the *new* dollar, two different things.

Congress planned to establish a *new* dollar. Its theory, we assume, was that prices and values in the *new* dollar would be nominally greater than in the *old* and that the change in prices would correspond to the devaluation. If

that was to happen, there was no reason why the nominal amount of a gold value debt should not be increased proportionately, unless Congress intended to impair the real value of gold value obligations.

If the monetary experiment had actually resulted as expected, it would be quite evident to everyone that a man who lent 1,000 *old* dollars on a gold clause bond in 1903 was losing a great deal today if paid only 1,000 *new* dollars. The fact that the monetary experiment did not produce exactly the results anticipated seems to us a criticism of the policy, not a criticism of the gold clause bonds. *And it cannot be said that the gold clause bonds were an "obstruction" to a policy of Congress, if the theory that there was an obstruction is entirely dependent on the assumption that Congress knew that the policy would not work.*

The facts seem clear. Congress intended to devalue the dollar in order to change the "price level"—that is, to have all prices and nominal values stated in higher nominal figures in the *new* dollar. By passing the Joint Resolution it showed that it did not want gold clause obligations to undergo a like *nominal* change. The only possible conclusion is that Congress wished to impair the real value of gold clause obligations—not only real value in gold, but worth in terms of "food * * * raiment * * * property, real or personal" (Petitioners' Brief, p. 136).

The fact that the "price level" has not changed *yet* in proportion to the devaluation is of no significance. No one knows if or when it will. Nor does anyone know whether there will be further devaluations. The Joint Resolution, if valid, removes all protection which the holders of gold clause bonds have against depreciation, while owners of most kinds of other property remain protected.

The discussion at page 52 of what a bondholder could have purchased from 1921 to 1929 is irrelevant on any theory. The bonds were sold in 1903. They matured in 1933. Even if the changes in the purchasing power of the dollar had had anything to do with the rights of the parties,

and they did not, why should a period of high prices from 1921 to 1929 have any bearing?

It is true in a certain sense that the gold clause is "an agreement of the contracting parties conditioned, in effect, upon the exercise by Congress of its power to regulate the value of money" (Petitioners' Brief, p. 52). That is simply another way of saying that it is a guarantee against discharge of the obligation by payment of the nominal amount in depreciated money. We do not know of any principle which makes a contract illegal because the rights of the parties under it may be affected if Congress exercises a lawful power. Every contract to pay a market price in the future would have the same effect as a gold value contract if a dollar devaluation produced as automatic an effect on prices as was apparently supposed.

"(III) THE GOLD CLAUSE—INCOMPATABILITY WITH LEGISLATION TO PROTECT THE CURRENCY RESERVES AND TO PROVIDE FOR MORE EFFECTIVE USE OF GOLD" (pp. 53-58)

As the Petitioners virtually admit at page 53, every word under this heading is inapplicable unless the gold clause is construed as an obligation to pay gold coin merely, and not as an obligation to pay gold value. Therefore, for the reasons given above at pages 1-3, it is unnecessary to discuss the arguments made.

"(IV) THE GOLD CLAUSE—AN OBSTRUCTION TO THE POWER OF THE CONGRESS TO BORROW MONEY" (pp. 58-62)

The power of Congress is to "borrow money *on the credit of the United States.*" This Court said on June 4, 1933, in *Lynch* v. *United States,* 292 U. S. 571, 580:

> "Punctillious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors."

The philosophy disclosed in the Brief is that the way for a public debtor to establish its credit is to impair its own outstanding obligations and all other obligations which

would compete with new issues in the money markets. The impairment must, of course, be so gauged as to bring all outstanding obligations at least down to the level of those to be issued. This philosophy would justify the impairment of all outstanding obligations at any time, as to principal amount, interest rates, maturity dates, security or any other provisions.

Of course, performance of contracts by payment of amounts of money measured by an established and agreed standard of value does not require Congress to establish "a dual monetary system" or "pass two different kinds of currency" (Petitioners' Brief, pp. 60-61).

The real relation of the Joint Resolution "to the power to borrow money on the credit of the United States" is set forth in our Main Brief at pages 46-47.

"(V) THE GOLD CLAUSE—AN INTERFERENCE WITH THE POWERS OF THE FEDERAL GOVERNMENT OVER INTERNATIONAL RELATIONS, FOREIGN EXCHANGE TRANSACTIONS, AND FOREIGN COMMERCE" (pp. 62-67)

The whole argument under this heading can be summed up in a single sentence: It is, that in order to promote foreign commerce more effectively Congress should have the power to impair private contracts.

Possibly an unlimited sovereign *might* control foreign commerce and negotiate more favorably with foreign nations if its people were regimented and every contract subject to regulations. We do not have that kind of a government, but our kind has countervailing advantages of greater importance. On no theory can the power to regulate foreign commerce embrace the authority to impair domestic money contracts.

"(VI) THE GOLD CLAUSE IN OTHER COUNTRIES" (p. 68)

The prohibition or abrogation of gold clause contracts in European countries has no significance here. The economic and financial situation in every one was radically different from ours. England took no such action.

"3. The Resolution is Within the Power of Congress" (pp. 68-87)

The preliminary statement under this heading quotes some general language from *Juilliard* v. *Greenman,* 110 U. S. 421. But in that case Justice GRAY specifically held that the power to issue paper money and make it legal tender was derived from the power to "borrow money," not from the coinage power (pp. 447-448).

"A. *Power over the coinage and currency*" (pp. 69-75)

It seems to be conceded that the "power to coin money, regulate the value thereof" embraces primarily the power to stamp coin and designate its monetary value.

In *Hepburn* v. *Griswold,* 8 Wall. 603, Chief Justice CHASE explained the meaning of the words "regulate the value thereof" (p. 616):

> "* * * This power of regulation is a power to determine the weight, purity, form, impression, and denomination of the several coins, and their relation to each other, and the relations of foreign coins to the monetary unit of the United States."

While *Hepburn* v. *Griswold* was overruled in *Knox* v. *Lee,* 12 Wall, 457, Chief Justice CHASE's explanation of the meaning of "regulate" was not challenged, nor has it ever been.

There is no dispute that Congress can issue irredeemable paper money and make it legal tender, even in time of peace. But this power is derived from the power "to borrow money on the credit of the United States," as a careful reading of *Knox* v. *Lee,* 12 Wall. 457, and *Juilliard* v. *Greenman,* 110 U. S. 421, will show. The statement at page 72 of the Petitioners' Brief on this subject is hardly accurate.

Congress has all the powers necessary to provide a "suitable medium of exchange" and establish "a sound and uniform currency" (*Veazie Bank* v. *Fenno,* 8 Wall. 533, 549).

But the fact that Congress can subject a *simple dollar* creditor "to a corresponding loss" by establishing a new dollar or by issuing irredeemable paper money begs the whole

question in this case. Such a creditor's contract calls merely for a dollar, not for gold value or any other agreed value (see our Main Brief, pp. 42-43). There is nothing in any decision of this Court which suggests that Congress has the power to eliminate retroactively an agreed measure of a money contract, whether it be the market price, an appraised value, or the market value of wheat or some other commodity, or a fixed standard established by law.

Justice STRONG's statements in *Knox* v. *Lee*, 12 Wall. 457, 551-552, which are quoted at page 71 of the Petitioners' Brief and relate to the six percent reduction of the dollar in 1834, have no bearing and are not a strictly correct statement of historical fact. They have no bearing, because he was speaking of a simple dollar debt and particularly stressed that fact twice (pp. 548, 549). And his statement was not strictly correct, because the adjustment made in 1834 was to reduce the gold dollar to the market value of the silver dollar. "The debts then became solvable with six percent less gold than was required to pay them before," but through the operation of Gresham's Law gold had been practically driven from circulation and the debts would have been paid in silver, not gold, and the reduction did not deprive the creditor even of an "expectancy."

Congressional Debates, June 21, 1934, Vol. X, Part IV, pages 4643-4674;
*Dewey's "Financial History of the United States,"* pages 210-212.

The significant fact is that from 1792 to 1934 the gold dollar remained substantially the same (*Bronson* v. *Rodes*, 7 Wall. 229, 247-249). The recent devaluation of the dollar and abrogation of gold clause contracts cannot be compared to the six per cent adjustment made in 1834 to bring the legal ratio of gold and silver in line with the market value of the metals, or to the discontinuance of the free coinage of silver in 1873, which was due to the fact that the high market

value of silver at that time had driven the silver dollar out of circulation.

*Dewey's "Financial History of the United States,"*
pages 403-407.

It is true that the issue of irredeemable legal tender paper money does subject creditors who hold obligations payable in a fixed number of dollars, simply, to a loss. It is also true that it is an indirect method of taxation. But these two effects of the issue of such money are objections to it, not arguments in its favor. The power to issue legal tender has been upheld, notwithstanding these objections, as an incident of the power "to borrow money on the credit of the United States." But it was upheld on the theory that a contract to pay dollars, simply, was a contract to pay whatever should be dollars when payment was made (*Knox* v. *Lee,* 12 Wall. 457, pp. 548-549; *Juilliard* v. *Greenman,* 110 U. S. 421, p. 449). That is obviously not true of a contract to pay a debt measured by an agreed standard of value.

If Congress can eliminate a lawful standard or measure of value from a contract, the reason must be that the power to "coin money, regulate the value thereof" was intended to be used as an instrument to impair the real value of contracts and should be perfected as such an instrument. But the fact that the issue of irredeemable legal paper money under the borrowing power or the devaluation of the dollar under the coinage power may have the unfortunate indirect effect of impairing the real value of one kind of contracts does not authorize Congress to alter the terms of a different kind of contracts so that they will be impaired too.

At page 75 of the Petitioners' Brief they state their real theory: *that Congress may counteract the effect of its own acts.* In so stating the proposition they overlook the fact that devaluation has no *real* effect on a gold clause contract, since the gold value payable is not changed. But not one of

the instances they cite supports the proposition even as they assert it.

In "the statutes of 1834 and 1853" Congress merely regulated the value of money, and did not "legislate to counteract the effect of market conditions upon money." Congress adjusted the gold value to conform to the market values of gold and silver, and did not attempt to adjust the market to a preconceived theory of what the ratio should be.

In taxing state bank notes Congress did not legislate "to overcome the policy of States" in the sense conveyed in the Brief. It legislated to exclude a competing form of money (*Veazie Bank* v. *Fenno,* 8 Wall. 533).

When Congress prohibited the export of silver coin from the Philippines (*Ling Su Fan* v. *U. S.,* 218 U. S. 302) Congress did not legislate to "counteract the activities of private parties" in the sense suggested by the Petitioners. It prohibited the export of coin on the theory that a sovereign has the same right to bar the export of coin as it has to prohibit its defacement, and that the prohibition was necessary to maintain a suitable medium of exchange.

In each and every instance the legislation was *monetary.* It looked directly to and acted solely on coin or other currency. The Joint Resolution looks directly to and operates solely on contracts. It starts with the words, "every provision."

"B. *Power to borrow money*" (pp. 75-77)

Nothing more need be said on this subject. Borrowing requires credit. Repudiation destroys credit. An act of repudiation cannot be authorized under a power to borrow.

*Lynch* v. *U. S.,* 292 U. S. 571, 580.

"C. *Power over foreign commerce and international relations*" (pp. 77-82)

This subject has already been referred to above at page 22.

Congress has power to "regulate commerce with Foreign Nations." How that can include the power to impair purely domestic private contracts we cannot perceive.

Under this same heading at pages 80-82 the Petitioners' attempt to meet the argument, which they say was made below, that the real purpose of the Joint Resolution was to relieve debtors. And they cite many cases to the effect that Congress may exercise its lawful powers for whatever purpose it chooses, "with a view to the needs of the country."

But the argument we made below and we make here is very different from the one the Petitioners purport to answer. We concede the right of Congress to exercise any lawful power for any purpose not inconsistent with the scope of the power. We concede that this Court will not, as a rule, inquire into the motives of Congress. But we say that *the Joint Resolution was not an exercise of any lawful power, and if the gold clause contracts obstructed any purpose of Congress, that purpose was not within the scope of any lawful power.*

At pages 80-82 the Petitioners virtually concede that by its monetary program Congress wished simultaneously to increase dollar prices and at the same time not increase the dollar or nominal amount of gold clause debts. The purpose was thus to impair the *real* value of the gold clause obligations. And, since the Joint Resolution had nothing to do with prices or anything else except the gold clause obligations, its *sole* purpose and effect was to impair such obligations.

We do not question that Congress, in the exercise of lawful powers, can and frequently does produce an indirect effect on prices. Thus, in the exercise of the borrowing power, it can issue new irredeemable paper money. The Federal Reserve Board, an agent of Congress, can influence prices through open-market purchases and sales of Government bonds, and there are many other ways in which prices can be affected by governmental action.

But none of these various ways requires the abandonment of the established standard of value. They are all steps taken without disturbing that standard and their effect is limited by the operation of the standard itself, since prices continue to be stated in terms of the standard.

We do not even go so far as to say that Congress may not create a new standard of value if it chooses. But we do say that if Congress substitutes a new standard of value and eliminates from outstanding obligations clauses providing that they shall be measured by the preexisting standard, it acts solely and directly to impair the obligations.

When there is an existing standard of value and all circulating money is maintained on a parity with it, all other prices are necessarily fixed in terms of that standard. They may fluctuate widely, but they fluctuate in terms of the standard. Parties who make a contract and agree that the obligation of the contract shall be measured by the standard accept the risk of all price fluctuations. But they do not accept the risk of having a new standard substituted and applied to their contract.

The facts are not obscured by the Petitioners' reference to the "abnormal price of gold itself" (p. 82). No one knows what is a "normal" price of anything. These bonds were issued in 1903, and, if an attempt were to be made to give the Bondholders the equivalent measured by any "price level," 1903 prices would control. But when they speak of "the abnormal price of gold itself," the Petitioners establish the fallacy in their argument. The price of gold cannot be abnormal, if gold is the standard.

In concluding on this subject we would add that the statement that "the Proclamation of the President reduced the weight of the gold dollar and brought the statutory value into substantial conformity with the new exchange ratio" (p. 80) is misleading if it was intended to convey the impression that the new exchange ratios were established by

normal business and foreign exchange transactions. They were established by the Government's policy of purchasing gold at increasing prices in dollars (see below pp. 31-32).

"D. *Power over contracts*" (pp. 82-87)

This heading reads as if Congress has an affirmative grant of power over contracts. Of course, it has none.

The *obiter* remarks of Justice BRADLEY in *Knox* v. *Lee,* 12 Wall. 457, 566-567, quoted at page 86 of the Petitioners' Brief, have already been referred to. He was writing for himself alone in that case, and differed with the majority of the Court in *Trebilcock* v. *Wilson,* 12 Wall. 687. Yet all he said on the subject was that he did not understand the majority of the Court were making a decision on a question not before the Court.

A much clearer indication of the majority view is to be found in *Bronson* v. *Rodes,* 7 Wall. 229, 253:

> "Can judicial sanction be given to the proposition that the government may discharge its obligation to the depositors of bullion by tendering them a number of note dollars equal to the number of gold or silver dollars which it has contracted by law to pay?"

"4. No Constitutional Limitations are Infringed by the Resolution" (pp. 87-96)

The Fifth Amendment has already been discussed (see our Main Brief, pp. 47-48, 60-62).

The Joint Resolution was not an exercise of any lawful power. *Louisville & Nashville Railroad* v. *Mottley,* 219 U. S. 467, *Philadelphia B. & W. R. R. Co.* v. *Schubert,* 224 U. S. 603, *Calhoun* v. *Massie,* 253 U. S. 170, and the other cases cited, do not help the Petitioners. In each of these cases Congress exercised a constitutional power the incidental effect of which was to affect contracts which were made before Congress acted. Such incidental effect was lawful. That is not

this case and is nothing like it. By this Resolution Congress does not purport to be regulating the value of money. The effect of the Resolution is not indirect or incidental. Its sole purpose and effect are directly to change all gold clause contracts and impair their value.

"5. The Joint Resolution is Controlling in the Case at Bar" (pp. 96-97)

We have assumed that the Joint Resolution covers the case at bar, although the use of the words "dollar for dollar" is rather incongruous, since a gold clause obligation is not a simple dollar obligation and we now have a new dollar.

## "II"

## "Independently of the Joint Resolution there is no basis for allowing the respondents' claim in other than the face amount of the bonds" (pp. 98-136)

"1. Analysis of the Argument" (pp. 98-101)

For the reasons stated at pages 1-4 above the entire argument under this subdivision of the Brief, from pages 98 to 136, is irrelevant, for it is based either on the proposition that the obligation was to pay coin merely and not to pay value, or on the proposition that the Respondents' rights are to be determined as of May 1, 1933.

However, since this part of the Brief sets forth the Petitioners' contentions with regard to the construction of the gold clause, and contains many statements which cannot be permitted to go unanswered, we shall reply to it as briefly as possible.

In the "Analysis of the Argument" the contention is first made that the gold clause merely provides for coin. That contention is discussed below.

Then, taking what we believe to be the true construction, that the clause provides for payment of gold value, the Petitioners say that "the question of the date as of which

the equivalent should be determined becomes controlling" and they assert that the correct date is May 1, 1933 (p. 100).

This last contention is not only mistaken for the reasons given above at pages 3-4, but is inconsistent with the statement made by the Petitioners only three pages before, where the law was correctly stated (p. 97):

> "* * * The obligation continued, after May 1, 1933, to be one to pay according to the face of the bonds; it did not become at that time one to pay a different amount as damages for breach. Compare *Hicks* v. *Guinness*, 269 U. S. 71, with *Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U. S. 517."

By "face" the Petitioners must have meant "terms," for the terms of the bonds did not change as a result of the default. The mortgage lien continues according to its terms until it is paid unless it has been changed by some constitutional authority, and the Joint Resolution of June 5, 1933, is the only enactment which has undertaken to change the terms of gold value obligations.

**"2. Analysis of the Gold Market as Affected by Congressional Acts and by Gold Orders"** (pp. 101-114)

The whole argument under this head is material only if the Railway Company was obligated to pay coin merely.

But, simply to clear the record, it should be said

First, that it was the Executive Order of April 20, 1933, referred to at page 103 (Appendix to Petitioners' Brief, pp. 18-20), which resulted in the country's going "off the gold standard."

Second, that from April 20, 1933, to January 31, 1934, the dollars circulating (other than gold coin and gold certificates) fluctuated at a disparity from the standard gold dollar (Petitioners' Brief, p. 106).

With respect to the initial departure from the gold standard the Commercial & Financial Chronicle wrote on July 1, 1933 (Vol. 137, Number 3549, p. 1, italics ours):

> "On Wednesday the foreign value of the American dollar was down to 76½¢ as against the 100¢ which was its customary value before the Administration at Washington *deliberately chose* to take this country off the gold standard and to invite the very depreciation of the American unit that is now proceeding in such an astounding fashion."

But apparently the goal of the Government was an even lower dollar than fear of devaluation produced. This was accomplished through the purchase of foreign gold with dollars, first by the U. S. Treasury and then by the Reconstruction Finance Corporation. These two government agencies offered more than the market price for gold in dollars, thus driving the dollar down (For specific examples see Commercial & Financial Chronicle for October 28, 1933, Vol. 137, pp. 3024-3025).

Third, that gold coin was never legally withdrawn from circulation until January 30, 1934, by the Gold Reserve Act; (Act of January 30, 1934, C. 6, Sec. 5, 48 Stat. 340).

Since the question is whether there is still a valid and subsisting gold value mortgage, and it makes no difference what might have happened if payment had been made on May 1, 1933, it is not our purpose to comment on the contentions at pages 98-114. We must say, however, that it seems to us that the contentions advanced, if sound, exclude gold from the protection of the "just compensation" clause of the Fifth Amendment, and that, if gold can be so excluded, we know of no reason why everything else cannot also be excluded by establishing a "commodity" dollar or some other new unit and placing a nominal price on any property the Government may choose to take.

At the present time there is not the slightest difficulty in computing the gold value of the mortgage. Indeed, the Petitioners have practically computed it themselves (p. 49).

But we are not concerned for the present only. We are concerned for the future. The Railroad Company has

not tendered anything in payment of the mortgage. No one can say when it will, or what the dollar will then be.

Furthermore, if gold value were paid now, as the mortgage requires, the bondholders could obtain more in new dollars than the numerical amounts specified in the bonds. They could obtain the true equivalent of the gold value agreed to be paid.

"3. The Gold Coin Interpretation" (pp. 114-134)

"A. *The gold clause should be interpreted to call simply for payment in gold coin*" (pp. 114-123)

"(I) INTENTION OF THE PARTIES AS EXPRESSED" (pp. 114-118)

The construction of the gold clause is discussed in our Main Brief at pages 19-33.

It is under this heading that the Petitioners virtually concede the true interpretation of the gold clause. For they say (p. 115) that "by providing that the gold coin so paid shall be of a particular standard, *it attempts to assure against payment in coin of lesser gold content.*"

If the Petitioners can tell *simply from reading the clause* that the parties were *attempting* to assure against repayment in coin of lesser gold content, the *intent* of the parties is clear. If it is clear from a mere reading of the clause what the parties were attempting to do, the question whether their attempt was legal has no bearing when we are determining their intent. Clearly the Petitioners conceded that the parties *intended,* among other things, to "assure against payment in coin of lesser gold content."

With this concession, what is there left to discuss with regard to the construction? If the mortgage cannot be discharged by paying the numerical amount in "coin of lesser gold content," how can it be discharged by paying the same numerical amount in dollars which are by statute and maintenance of parity equal to such coin? For the Petitioners also concede that the clause was intended to "protect against depreciation of * * * paper money compared with gold" (p. 115).

The argument about negotiability cannot carry any weight. The bonds were negotiable when they were issued, since they called for payment of a "sum certain" in money then lawful. Possibly the gold clause might have had the effect of making them non-negotiable if the standard dollar were changed. But, if so, it is of no importance. The parties had a dominant purpose to provide for gold value; the Railway Company called the bonds "Gold Bonds." And the existence of any desire of the Railway Company to have the bonds negotiable must be inferred from the most meagre references to the subject in the bonds and mortgage.

"(II) BRONSON *v.* RODES AND SUCCEEDING CASES SUPPORT THIS CONSTRUCTION" (pp. 118-120)

*Butler* v. *Horwitz*, 7 Wall. 258, and *Dewing* v. *Sears*, 11 Wall. 379, seemed to hold that, if gold coin be in circulation, even a defaulting debtor on a gold coin obligation is entitled to have a gold coin judgment entered against him rather than a judgment for the equivalent in dollars, simply, if the latter are not at a parity. So long as gold coin is in circulation there is no real reason why the judgment should not be stated in gold coin. But in *Gregory* v. *Morris*, 96 U. S. 619, this Court said (p. 625, italics ours):

> "While we have decided that a judgment upon a contract payable in gold *may* be for payment in coined dollars, we have never held that it *must* be so."

And *Gregory* v. *Morris* did involve a gold obligation. It is true that the suit was not "upon the contract," but it seems perfectly clear from a reading of the whole case that the gold obligation measured the amount of the recovery.

The significant thing about the cases decided by this Court involving gold obligations is that in every case the Court gave a just judgment, whether for gold coin or the equivalent.

"(III) ENGLISH AND PERMANENT COURT CASES DISTINGUISHED" (pp. 120-123)

It may be possible to "distinguish" these cases by pointing out trivial points of difference, but the great principles they established apply here (see our Main Brief, pp. 24-31).

"B. *Payment in gold coin has been and is impossible and illegal and should be excused*" (pp. 123-127)

"(I) IMPOSSIBILITY IN FACT" (pp. 124-125)

"(II) IMPOSSIBILITY IN LAW" (pp. 125-127)

"C. *The gold clause obligation may be satisfied by payment of its stated dollar amount, in consequence of impossibility in fact and in law*" (pp. 128-130)

Since the arguments under these heads are based on the premise that the gold clause called for coin merely, it is unnecessary to answer them for the reasons given above (pp. 1-3).

"D. *Even if respondents were paid at any time in gold coin its value to them would be only the face amount thereof*" (pp. 131-134)

The only reason why it is necessary to reply to this argument at all is because it is asserted at page 133 that the Respondents "are seeking a windfall—not indemnity for loss." This is an astounding statement and as fallacious as it is unfair.

The bondholders loaned money on terms offered by the Railway Company. They ask nothing except that the debt be paid in the amount which the Railway Company agreed to pay.

Even the supposition advanced as to what might have happened if the debt had been paid on May 1, 1933, is fallacious, if it is intended to convey the idea that the bondholders would have received only so many dollars then and should receive only the same number of dollars if and when

the mortgage is satisfied. They are talking of two different kinds of dollars—different both in gold value and different in worth in terms of everything else.

It is only because the dollar devaluation did not have all the expected results that this claim of "windfall" is even advanced. For if, as was expected, all prices and values had risen proportionately, it would be apparent even to the unthinking that the new dollars were proportionately less valuable than the old except to pay fixed simple dollar obligations.

And for one other reason it is unfair as well as irrelevant for the Petitioners to write of the present prices. The mortgage is not being paid now. No one knows what the "price level" will be when it is.

"4. The Currency Equivalent Interpretation" (pp. 134-138)

"A. *The currency equivalent is the stated dollar amount of the obligation*" (pp. 134-136)

"B. *Even if currency equivalence is defined in terms of statutory price of gold the obligation may be satisfied at its dollar face amount in legal tender, since conversion is appropriate as of May 1, 1933*" (pp. 136-138)

The same fallacy and unwarranted charge are advanced under these headings.

The respondents demanded "coin" in their intervening petition, filed in December, 1933 (R. 60), because it was the proper demand to make at that time under *Bronson* v. *Rodes*, 7 Wall. 229. The Gold Reserve Act had not been passed and gold coin was lawful money of the United States.

The Respondents say that it is necessary "to select a standard for determining such equivalence" (p. 134). That is perfectly true, except that *the standard has already been selected by the parties.* It was the gold standard of May 1, 1903. Measured by that standard the determination of the equivalence today is a matter of simple arithmetic.

The Petitioners imply that there has been some change in the Respondents' contention as to the proper way to compute gold value (p. 134). On December 27, 1933, the "market value" was the true measure. It still is. But all current dollars are now maintained on a parity with the new statutory gold dollar, and, so long as that condition continues and the new statutory gold dollar remains unchanged, the gold value of the old gold dollar can be readily computed in terms of the new gold dollar merely by reference to the statutes and the President's Proclamation of January 31, 1934 (Appendix to Petitioners' Brief, pp. 144-148).

Guesses about what the bondholders might have done or may do with their money are not material (p. 136). The bonds were not "purchasing power" obligations. They were not simple dollar obligations. They were gold value obligations.

The bondholders were prepared to take, and did take, all the risks involved in investing money in a thirty-year contract on such terms. Those risks included the possibility of wide fluctuations in the prices of other things measured in gold value. But the bondholders did not assume the risk of being paid less gold value as a result of dollar devaluation. They were expressly protected against that. The only question here is whether Congress had a right to remove that protection simply because the time came when the bondholders needed the protection.

## "III"

### "Power over coinage and currency is an attribute of sovereignty" (pp. 138-154)

We do not agree that this proposition has any application to this case except to establish the unconstitutionality of the Joint Resolution.

Congress has every necessary power to secure "a wholesome and uniform currency throughout the Union," as

Justice STORY said (Petitioners' Brief, p. 142); to "satisfy the wants of the community in respect of a circulating medium" and "secure a sound and uniform currency," as Chief Justice CHASE said in *Veazie Bank* v. *Fenno,* 8 Wall, 533, 549.

But this Court has also said that a standard of value is "indispensable to the community" and that Congress has "the trust and the duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union" (*U. S.* v. *Marigold,* 9 How. 559, at pp. 566, 567).

It was long thought, and many still believe, that a currency which is not exchangeable for a fixed quantity of precious metal cannot be "sound." Opinions now differ. We do not ask the Court to hold that Congress must maintain a fixed metallic standard. But we do contend that if Congress does establish a fixed standard, and contracts lawfully and expressly incorporate it, Congress cannot change those contracts.

Otherwise, we can never have anything except a standardless commerce. For a dollar which contains no fixed amount of precious metal and which can be issued in unlimited quantities may prove to have no value at all. And if, after a standard has been fixed, a new standard can be substituted and the substitution applied retroactively to contracts which expressly incorporated the original fixed standard, it means that the original standard was not truly fixed for any real purpose. The necessary result is that Congress will always have the power to destroy the real value, measured in anything but "dollars" (which might come to have no value), of all money contracts by whatever so-called standard made.

Can it be consistent with the power of Congress to provide a sound currency that Congress should be powerless to establish a standard of value on which reliance will be placed because of confidence in the standard itself? Surely any such interpretation of the coinage power is not only at vari-

ance with what this Court said in *U. S.* v. *Marigold,* 9 How. 559, 566, but is the complete negation of everything the Court there said. For it means that, instead of having a duty of creating a metallic standard, Congress cannot establish any metallic standard which can properly be called such.

The expectation of the framers of the Constitution was that money would be coin and would be the standard of value also. From 1792 to 1933 we had for all practical purposes the same standard gold dollar. The growth of the nation took place *while* the standard was maintained, and who will say that it was not largely *because* the standard was sound and was maintained? Our most distressing periods have *coincided* with attempts to change the standard, and who will say that the attempts did not increase the distress? Never in our history has it been supposed that any authority could impair a contract which incorporated a standard by striking out the standard. Who will say that the security and confidence resulting has not been a principal factor in our growth and prosperity? We now have a currency, but no real standard. Can anyone know that in the long run a real standard will not prove "indispensable to the community?" (*U. S.* v. *Marigold,* 9 How. 559, 567.)

Where Congress has fixed a standard and parties have incorporated it in their contracts, it is so destructive of all security for Congress to assert the power to strike the standard from the contracts that the implications of such a power must be apparent.

In the last analysis, the question is whether Congress has a plenary power over money contracts. If the latter be true, it is difficult to see how the constitution would have been very different if it had contained an express delegation of power to enact laws for the relief of all debtors, solvent as well as insolvent. Congress has had no power to do that, and the states have been expressly prohibited from doing it. The resulting confidence in the inviolability of contracts

must have had much to do with our development as a nation, and we most emphatically cannot agree that any situation has yet arisen which requires the abandonment of the great principle involved.

## CONCLUSION

A careful reading of the Petitioners' Brief clearly establishes that the purpose and intended effect of the Joint Resolution were to impair the real value of gold clause obligations.

The Brief discusses four factors in the situation with which the monetary policy was supposed to deal, (1) the "price level," (2) the "debt burden," (3) the Government's desire to "borrow money on the credit of the United States," and (4) the state of foreign commerce. Two of these factors can be dismissed.

This Court's statement in *Lynch* v. *U. S.*, 292 U. S. 571, 580, sets forth the true relation between the Joint Resolution and the credit of the United States.

The Agricultural Adjustment Act itself shows that, *in so far as the state of foreign commerce influenced the monetary policy, the purpose was to raise prices* (Act of May 12, 1933, Secs. 1, 2, 43; 48 Stat. 31-32, 51-53).

The two real factors in the situation which Congress sought to affect were, therefore, the "price level" and the "debt burden." They were clearly at the heart of the whole monetary policy. The Agricultural Adjustment Act recited that its purpose was to increase the price of farm commodities (Act of May 12, 1933, Secs. 1, 2, 48 Stat. 31-32). The author of the Thomas Amendment said that its purpose was to transfer property from creditors to debtors (*supra*, pp. 16-17). The "price level" and the "debt burden" were not isolated factors. It was their relation to each other which was important.

The situation in the Spring of 1933 was that prices were low, *as compared to prices from 1921 to 1929.* The Department of Labor had taken 1926 as an *index* year for the

purpose of showing variations in certain price averages, not with any idea that 1926 was "normal," because there is no such thing as a "normal" price even of a single thing. But the 1926 Index came to be used, as the Petitioners use it (p. 33), as if 1926 had been the "normal," and the notion was advanced that debtors were being called upon in 1933 to pay more than they had borrowed. Of course, they were not *in dollars* or *in gold value.* Whether the dollars had a greater worth in terms of *other things* than the dollars they had lent depended on *when they had lent the money* and *what other things were used as a basis of comparison.* As a matter of contract rights, it was immaterial. But the fact was that a large amount of debt had been created when prices were high and was not easy to liquidate when prices were lower.

In providing for the devaluation of the dollar and the abrogation of gold clauses, Congress clearly intended to increase nominal prices and to prevent an increase in the nominal amount of gold clause debts. Indeed, applying the principle that reasonable men are presumed to intend the consequences of their own acts, *Congress could not have had anything else* in mind. While Congress said in the Joint Resolution that the gold clauses were an obstruction to the devaluation of the dollar, it is perfectly clear that they were not an obstruction to the devaluation itself, and could not obstruct any purpose of the devaluation except the purpose to reduce the real value of outstanding gold clause obligations. The mere assertion that they were an obstruction was, for all practical purposes, an announcement of the real purpose of the devaluation.

Congress, however, decided to devalue and abrogate the gold clause contracts. And what happened? The price rise apparently did not take place to the extent expected.

*For the asserted failure of the devaluation to produce a corresponding rise in prices is now advanced as a reason why the Joint Resolution should be sustained* (pp. 135-136; see Chart in Petitioners' Brief, p. 33). The Respondents,

Trustees of a Mortgage, owing clear duties to the beneficiaries of their trust, are accused of seeking a "windfall." There would have been no such accusation if the devaluation had already accomplished what it was expected to bring about. Nor is it certain or even likely that there will be a "windfall." The status today has nothing to do with the case.

If the bondholders were offered today 1,000 new dollars for every bond they might all accept them and the Trustees would then have no duty to perform. But no one has offered the bondholders anything. Congress and the Court below have said that they can be paid the nominal amount of *any kind of dollars.* They may not be paid until 1938 or 1940. What will be the value of the dollar then? Even if there be no further devaluations, belated results from the devaluation already effected may be felt and may result in a tremendous rise in prices.

The bondholders had faith in gold value. They did not have the same faith in dollars, simply. The Railway Company promised them gold value. They bought the bonds. Can anyone say that they were not wise in asking for gold value bonds, or that the mortgage should be paid with less?

There is no doubt that the situation in 1933 was serious, or that it is serious now. There is no question that Congress was the body to decide what constitutional action should be taken to meet it. And in determining whether action taken was constitutional or not great weight can properly be given to changed conditions.

But, we submit, the situation in 1933 did not require the abandonment of any great constitutional principle. Nor does the situation today. We are not such a weak people that four years of economic maladjustment, however serious, will induce us to abandon principles of government which have served us well for 140 years.

That is, we submit, what those who seek to sustain the Joint Resolution ask us to do. For the Joint Resolution

cannot, we believe, be sustained unless the Federal Government has, and always has had, the power to compel its citizens to make their money contracts in dollars, simply, and also the power to change any fixed standard of value established by law and to apply such change to outstanding contracts which have expressly incorporated the standard. There is no reason why the Federal Government should be found to possess any such powers unless it be in order that the Congress may control all money contracts.

The power to "coin money, regulate the value thereof" was not intended to embrace, and no reasonable construction of it does embrace, a power to regulate money contracts.

If it is to be said that Congress may control all money contracts, the theory must be that Congress may and should exercise its power "to coin money, regulate the value thereof" from time to time to change the relation between the "price level" and the "debt burden." This, of course, means that Congress is not to establish a fixed standard of value, and that prices and all other relative changes will not be determined by normal business based on that standard of value, but that Congress is to have complete control over all money contracts by compelling all business to be done in a variable medium of exchange, simply, and that prices, debts, wages and other factors are supposed to respond to that control.

*The important thing is that the Joint Resolution, if valid, necessarily effects a permanent change, not only in the gold clause contracts, but in the relation of Congress to all money contracts.* By denying the right to use a fixed amount of gold as a standard of value, it impliedly prohibits the use of any other standard or measure of any kind, whether established by law or not. By asserting the power of Congress to eliminate from all money contracts all provisions incorporating the very standard which Congress itself has established, it necessarily implies that any other standard Congress may establish will be equally insecure. Thus it commits the country to the theory that a "sound and uniform currency"

in the old sense is *permanently* a thing of the past, and that the true scope of the money power is to regulate prices and debts.

Such a power over money contracts would so alter the fundamental character of our government that it is not too much to say that it would be entirely inconsistent with the conception of a government of limited powers. If the real function of Congress is to raise and lower nominal prices and to increase and decrease the real value of money obligations through the management of the currency, is it not incongruous that it should not have the power to correct maladjustments between the prices of different things or between different kinds of money obligations? Indeed, will not prices of certain things or particular classes of debts be found to be an "obstruction" of this broad money power, and regulated on that theory? And, of course, wages are simply prices for personal services.

This is not a fantastic supposition. In an address at Cleveland, Ohio, on November 10, 1933, which is reported in *The United States Law Week* for November 14, 1933, Vol. 1, No. 11, p. 179, the General Counsel of the National Recovery Administration, Donald R. Richberg, said:

> "The Congress is also expressly empowered 'to coin money' and to 'regulate the value thereof'—and the implications of this power have received, so far as I am aware, no consideration from those who have questioned the validity of the Recovery Act. But it has been universally recognized that the regulation of the value of money is a necessary part of any program of economic recovery. The difficulty of regulating the value of money by the gold standard has been increased by the lack of a definite relationship between a quantity of gold, which is used as a token of value, and a quantity of human labor which is the persistent actual standard of the value of goods and services. It should not be necessary to indulge in an elaborate discussion of economic theories to demonstrate that the Federal Government would be acting within its acknowledged powers in seeking to relate

> the value of money to a certain quantity and quality of labor, and that one appropriate method to employ would be to establish a basic standard of maximum hours and minimum wages for labor. The establishment of such a standard would play a useful part in regulating and stabilizing the value of money."

See also *Hart Coal Corp.* v. *Sparks*, 7 Fed. Sup. 16, 28.

We ask the Court to consider the significance of the assertion by such an authority that Congress has the power *"to relate the value of money to a certain quantity and quality of labor."* It simply means that Congress possesses the power to fix any wage at any time if the wage is payable in money. And the theory that a quantity and quality of labor is a true standard of value involves no more new concepts than a theory that a quantity and quality of land or commodities would be such a standard. If Congress has the power to fix all wages it also has the power to fix all prices.

A power to fix all prices and all wages seems to us so at variance with any concept of a government of limited powers that no further observations are necessary. The true position of the General Counsel of the National Recovery Administration and of the Petitioners here is that we should have a Federal Government of unlimited powers, that we should have a different constitution.

**The decree below should be reversed.**

Respectfully submitted,

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29 December, 1934.